

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 SOUTHERN DIVISION

11 DEBRA ANN CARLON,

12 Plaintiff,

13 v.

14 NANCY A. BERRYHILL, Acting
15 Commissioner of Social Security,

16 Defendant.
17
18
19

Case No. 8:17-cv-00802-JDE

MEMORANDUM OPINION AND
ORDER

20 Plaintiff Debra Ann Carlon (“Plaintiff”) filed a Complaint on May 5,
21 2017, seeking review of the Commissioner’s denial of her application for
22 disability insurance benefits (“DIB”). The parties filed consents to proceed
23 before the undersigned Magistrate Judge. In accordance with the Court’s
24 Order Re: Procedures in Social Security Appeal, the parties filed a Joint
25 Stipulation (“Jt. Stip.”) on April 17, 2018, addressing their respective positions.
26 The Court has taken the Joint Stipulation under submission without oral
27 argument and as such, this matter now is ready for decision.
28

I.

BACKGROUND

On September 27, 2013, Plaintiff applied for DIB, alleging disability beginning December 30, 2011. (Administrative Record [“AR”] 27, 44, 105, 219-225.) After her application was denied initially (AR 105), and on reconsideration (AR 118), Plaintiff requested an administrative hearing. (AR 27, 135.) The first part of her hearing was held on September 1, 2015. (AR 60.) Plaintiff, represented by counsel, appeared and testified before an Administrative Law Judge (“ALJ”), as did Dr. Eric Schmitter, a medical expert (“ME”). (AR 61-91.) The second part of the hearing was held on January 12, 2016. (AR 42.) Plaintiff, again represented by counsel, appeared and testified before the same ALJ, as did Dr. Schmitter, and Victoria Rei, a vocational expert. (AR 44-59.)

On February 1, 2016, the ALJ issued a written decision finding Plaintiff was not disabled. (AR 27-34.) Although Plaintiff had earnings in 2012, the ALJ gave Plaintiff the benefit of the doubt and found that she had not engaged in substantial gainful activity since December 30, 2011, the alleged onset date. (AR 29.) The ALJ determined that Plaintiff suffered from the following severe impairments: status post lumbar fusion in 2008 with subsequent revision; status-post left shoulder arthroscopy; and mild left carpal tunnel syndrome. (AR 29.) The ALJ found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled a listed impairment. (AR 30-31.) The ALJ also found that Plaintiff had the residual functional capacity (“RFC”) to perform light work, with the following limitations: Plaintiff could (1) lift and carry up to 20 pounds occasionally, and 10 pounds frequently; (2) stand and walk for six hours in an eight-hour workday; (3) sit without limitation, but with the opportunity to change positions for one to three minutes each hour; (4) occasionally climb stairs,

1 bend, balance, stoop, kneel, crouch, or crawl; (5) not climb ladders, ropes, or
2 scaffolds; (6) use her left upper extremity for occasional overhead reaching,
3 and for frequent gross and fine manipulation. (AR 31.) The ALJ further found
4 that Plaintiff was capable of performing past relevant work as a general clerk.
5 (AR 33-34.) Accordingly, the ALJ concluded that Plaintiff was not under a
6 “disability,” as defined in the Social Security Act. (AR 34.)

7 Plaintiff filed a request with the Appeals Council for review of the ALJ’s
8 decision. (AR 8-9.) On April 5, 2017, the Appeals Council denied Plaintiff’s
9 request for review, making the ALJ’s decision the Commissioner’s final
10 decision. (AR 1-6.) This action followed.

11 II.

12 STANDARD OF REVIEW

13 Under 42 U.S.C. § 405(g), a district court may review the
14 Commissioner’s decision to deny benefits. The ALJ’s findings and decision
15 should be upheld if they are free from legal error and supported by substantial
16 evidence based on the record as a whole. Brown-Hunter v. Colvin, 806 F.3d
17 487, 492 (9th Cir. 2015) (as amended); Parra v. Astrue, 481 F.3d 742, 746 (9th
18 Cir. 2007). Substantial evidence means such relevant evidence as a reasonable
19 person might accept as adequate to support a conclusion. Lingenfelter v.
20 Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla, but less
21 than a preponderance. Id. To determine whether substantial evidence supports
22 a finding, the reviewing court “must review the administrative record as a
23 whole, weighing both the evidence that supports and the evidence that detracts
24 from the Commissioner’s conclusion.” Reddick v. Chater, 157 F.3d 715, 720
25 (9th Cir. 1998). “If the evidence can reasonably support either affirming or
26 reversing,” the reviewing court “may not substitute its judgment” for that of
27 the Commissioner. Id. at 720-21; see also Molina v. Astrue, 674 F.3d 1104,
28 1111 (9th Cir. 2012) (“Even when the evidence is susceptible to more than one

1 rational interpretation, [the court] must uphold the ALJ’s findings if they are
2 supported by inferences reasonably drawn from the record.”). However, a
3 court may review only the reasons stated by the ALJ in his decision “and may
4 not affirm the ALJ on a ground upon which he did not rely.” Orn v. Astrue,
5 495 F.3d 625, 630 (9th Cir. 2007).

6 Lastly, even when the ALJ commits legal error, the Court upholds the
7 decision where that error is harmless. Molina, 674 F.3d at 1115. An error is
8 harmless if it is “inconsequential to the ultimate nondisability determination,”
9 or if “the agency’s path may reasonably be discerned, even if the agency
10 explains its decision with less than ideal clarity.” Brown-Hunter, 806 F.3d at
11 492 (citation omitted).

12 III.

13 DISCUSSION

14 The parties present four disputed issues (Jt. Stip. at 4)¹:

15 Issue No. 1: Whether the ALJ properly considered Plaintiff’s subjective
16 symptoms;

17 Issue No. 2: Whether the ALJ properly considered Plaintiff’s severe
18 impairments;

19 Issue No. 3: Whether the ALJ erred in assessing Plaintiff’s RFC; and

20 Issue No. 4: Whether the ALJ properly considered the medical expert’s
21 opinion.

22 A. Plaintiff’s subjective symptom testimony

23 Where a disability claimant produces objective medical evidence of an
24 underlying impairment that could reasonably be expected to produce the pain
25 or other symptoms alleged, absent evidence of malingering, the ALJ must
26

27 ¹ The Court has reordered the issues as presented by the parties because they are
28 interrelated and dependent on a proper determination of the first issue.

1 provide “‘specific, clear and convincing reasons for’ rejecting the claimant’s
2 testimony regarding the severity of the claimant’s symptoms.” Treichler v.
3 Comm’r Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th Cir. 2014) (citation
4 omitted); Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); see also 20
5 C.F.R. § 404.1529(a). The ALJ’s findings “must be sufficiently specific to
6 allow a reviewing court to conclude that the [ALJ] rejected [the] claimant’s
7 testimony on permissible grounds and did not arbitrarily discredit the
8 claimant’s testimony.” Moisa, 367 F.3d at 885 (citation omitted). However, if
9 the ALJ’s assessment of the claimant’s testimony is reasonable and is
10 supported by substantial evidence, it is not the court’s role to “second-guess” it.
11 See Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).²

12 During the administrative hearings, Plaintiff testified that she worked as
13 a human resources office technician for the State of California until December
14 2011. (AR 51-52, 70-71, 77-78.) She had multiple back surgeries; she was laid
15 off because of her poor work attendance due to her condition. (AR 70-71, 78-
16 79.) She searched for work until around mid-2013, but stopped looking
17 because of her back pain. (AR 52, 72-73.) Her pain is in her left lower back,
18 and it radiates down her left leg. (AR 81.) She has burning and stabbing pain in
19 her left foot, making it difficult to walk. (AR 73, 81.) She also has carpal tunnel

20 ² After the ALJ’s decision, SSR 16-3p went into effect. See SSR 16-3p, 2016 WL
21 1119029 (Mar. 16, 2016). SSR 16-3p provides that “we are eliminating the use of the
22 term ‘credibility’ from our sub-regulatory policy, as our regulations do not use this
23 term.” Id. Moreover, “[i]n doing so, we clarify that subjective symptom evaluation is
24 not an examination of an individual’s character” and requires that the ALJ consider
25 all of the evidence in an individual’s record when evaluating the intensity and
26 persistence of symptoms. Id.; Trevizo v. Berryhill, 871 F.3d 664, 678 n.5 (9th Cir.
27 2017) (as amended). Thus, the adjudicator “will not assess an individual’s overall
28 character or truthfulness in the manner typically used during an adversarial court
litigation. The focus of the evaluation of an individual’s symptoms should not be to
determine whether he or she is a truthful person.” SSR 16-3p, 2016 WL 1119029, at
*10.

1 that causes stabbing and burning pains in her hands. (AR 82.) Her level of pain
2 is eight out of ten on her best day, and nine out of ten on her worst day. (Id.)
3 She has problems sleeping and has to nap during the day. (AR 83.)

4 Regarding her limitations, Plaintiff testified can sit for about an hour,
5 and then she has to get up and walk around for 15 to 20 minutes. (AR 83-84.)
6 She can stand for about 30 minutes, and then her back and left leg begin to
7 hurt. (AR 84-85.) She can walk about a block, using a prescribed cane. (AR
8 85.) She can lift two to three pounds. (Id.) She has difficulty climbing stairs,
9 grasping items, and with fine manipulation. (AR 85-87.) She can drive just a
10 few blocks. (AR 87-88.) She can do a little cleaning and not very much
11 cooking. (AR 88.) She shops for groceries, but her husband accompanies her.
12 (AR 88-89.) Her husband and daughter help with household chores. (Id.) She
13 has difficulty showering. (AR 90.) She takes a variety of medication for her
14 pain, depression, muscle spasms, and to help her sleep. (AR 73-75.) The
15 medication makes her drowsy, tired, and constipated, and it affects her ability
16 to concentrate and think. (AR 73, 82-83.) She also uses a TENS³ unit, heat,
17 and ice on her back. (AR 75-77.)

18 The ALJ provided a one-sentence summary of Plaintiff's subjective
19 allegations, and listed some activities Plaintiff mentioned in a function report,
20 "including self-care, housework, errands (including driving and shopping in
21 stores), and social and leisure activities." (AR 31, citing AR 258-65.) The ALJ
22 determined Plaintiff's "medically determinable impairments could reasonably
23 be expected to cause the alleged symptoms," but her "statements concerning
24 the intensity, persistence and limiting effects of these symptoms [were] not
25 entirely credibly insofar as they are not fully supported by the medical evidence
26

27 ³ "TENS" stands for "transcutaneous electric nerve stimulator." Int'l Rehabilitative
28 Sci. Inc. v. Sebelius, 688 F.3d 994, 998 (9th Cir. 2012).

1 of record.” (*Id.*) The ALJ then proceeded to summarize the medical evidence
2 of record. (*Id.*) As explained below, the Court finds the ALJ failed to provide
3 legally sufficient reasons for discrediting Plaintiff’s testimony.

4 Preliminarily, to the extent it can be gleaned from the decision that the
5 ALJ relied on Plaintiff’s reported daily activities to discount her testimony, the
6 finding is insufficient. The ability to engage in activities such driving,
7 shopping, and taking care of simple cleaning tasks around the house have been
8 found unpersuasive by the Ninth Circuit in discounting subjective symptom
9 testimony. *See, e.g., Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001)
10 (“This court has repeatedly asserted that the mere fact that a plaintiff has
11 carried on certain daily activities, such as grocery shopping, driving a car, or
12 limited walking for exercise, does not in any way detract from her credibility as
13 to her overall disability.”); *Oldham v. Astrue*, 2010 WL 2850770, at *9 (C.D.
14 Cal. July 19, 2010) (“The fact that [claimant] may be able to wash a few
15 dishes, wipe down a bathroom, or do a load of laundry does not constitute
16 convincing evidence that [claimant] could handle the more rigorous demands
17 of the workplace.”). The Ninth Circuit has “repeatedly warned that ALJs must
18 be especially cautious in concluding that daily activities are inconsistent with
19 testimony about pain, because impairments that would unquestionably
20 preclude work and all the pressures of a workplace environment will often be
21 consistent with doing more than merely resting in bed all day.” *Garrison v.*
22 *Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014). “[O]nly if [her] level of activity
23 [was] inconsistent with [a claimant’s] claimed limitations would these activities
24 have any bearing on [her] credibility.” *Id.*

25 Moreover, the Court agrees with Plaintiff that the ALJ failed to make
26 any finding as to the transferability of her minimal activities to the workplace.
27 (Jt. Stip. at 23; AR at 31); *see Martinez v. Berryhill*, 721 F. App’x 597, 600 (9th
28 Cir. 2017) (ALJ improperly “discounted [claimant]’s testimony based on her

1 daily activities . . . [without] support[ing] the conclusions as to the frequency of
2 those activities or their transferability to the workplace.”); Orn, 495 F.3d at 630
3 (ALJ must make “specific findings related to [the daily] activities and their
4 transferability to conclude that a claimant’s daily activities warrant an adverse
5 credibility determination”).

6 The only articulated reason for rejecting Plaintiff’s credibility was that
7 her statements were “not fully supported by the medical evidence of record.”
8 (AR 31.) This is insufficient for two reasons. First, the ALJ did not identify any
9 specific subjective allegations that were inconsistent with the medical evidence.
10 See Brown-Hunter, 806 F.3d at 494 (“We cannot review whether the ALJ
11 provided specific, clear, and convincing reasons for rejecting [the claimant’s]
12 pain testimony where, as here, the ALJ never identified which testimony she
13 found not credible, and never explained which evidence contradicted that
14 testimony.”); Burrell v. Colvin, 775 F.3d 1133, 1138 (9th Cir. 2014) (“General
15 findings are insufficient; rather the ALJ must identify what testimony is not
16 credible and what evidence undermines the claimant’s complaints.” (citation
17 omitted)). Instead, the ALJ simply stated her conclusion, and followed with a
18 summary of the medical evidence. (AR 31.) This is inadequate to support a
19 finding upon review. See Brown-Hunter, 806 F.3d at 494 (credibility
20 determination insufficient when ALJ “simply state[s] her non-credibility
21 conclusion and then summarize[s] the medical evidence”).

22 Second, because the ALJ did not provide any other clear and convincing
23 reason for discounting Plaintiff’s subjective complaints, reliance on the lack of
24 objective evidence alone is not a sufficient basis for the ALJ’s credibility
25 determination. See Rollins, 261 F.3d at 856-57; Burch v. Barnhart, 400 F.3d
26 676, 681 (9th Cir. 2005) (lack of objective medical evidence to support
27 subjective symptom allegations cannot form the sole basis for discounting pain
28 testimony); Dschaak v. Astrue, 2011 WL 4498835, at *1 (D. Or. Sept. 27,

1 2011) (“[O]nce the[] other bases for the ALJ’s decision were discarded as
2 erroneous, the ALJ’s credibility determination could not rely solely on
3 conflicts with the medical evidence.”).

4 The Commissioner contends that the ALJ also relied on treatment
5 records demonstrating “good” pain management. (Jt. Stip. 21.) However, the
6 ALJ did not specifically delineate that as a reason in discounting Plaintiff’s
7 subjective symptoms. The Court is “constrained to review the reasons the ALJ
8 asserts” and may not affirm the decision of the Commissioner on a ground the
9 ALJ did not invoke in reaching her decision. Connett v. Barnhart, 340 F.3d
10 871, 874 (9th Cir. 2003); Orn, 495 F.3d at 630. While the ALJ mentioned
11 Plaintiff’s reports of pain relief from some treatment procedures,⁴ those
12 notations appear in her summary of the evidence and are not tethered to any
13 specific testimony. (AR 32-33.) Moreover, the ALJ also noted that other
14 “[p]hysical examination findings supported [Plaintiff’s] subjective reports.”
15 (AR 32 (emphasis added).) Without any reconciliation of these objective
16 findings, or any attempt to show how they reflected unfavorably on Plaintiff’s
17 testimony, the findings do not allow for meaningful review. Brown-Hunter,
18 806 F.3d at 492 (federal courts “demand that the agency set forth the reasoning
19 behind its decisions in a way that allows for meaningful review”).

20 Accordingly, the ALJ did not provide specific, clear and convincing
21 reasons supported by substantial evidence to discount Plaintiff’s subjective
22 symptom testimony. In this instance, the Court cannot conclude that the ALJ’s

23
24 ⁴ Some pain relief cited by the ALJ was temporary. Plaintiff reported “breakthrough”
25 pain in the afternoons following temporary relief earlier in the day. (AR 32, 755.)
26 This breakthrough pain occurred even when she was on methadone. (AR 755); See
27 Gonzalez v. Colvin, 2016 WL 5388948, at *4 n.5 (C.D. Cal. Sept. 26, 2016)
28 (methadone is a used for severe pain in people who are expected to need pain
medication around the clock for an extended period of time and who cannot be
treated with other medications).

1 error was harmless. See, e.g., Brown-Hunter, 806 F.3d at 492-93 (ALJ’s failure
2 adequately to specify reasons for discrediting claimant testimony “will usually
3 not be harmless”). In light of the significant functional limitations reflected in
4 Plaintiff’s subjective statements, the Court cannot “confidently conclude that
5 no reasonable ALJ, when fully crediting the [Plaintiff’s] testimony, could have
6 reached a different disability determination.” Stout v. Comm’r, Soc. Sec.
7 Admin., 454 F.3d 1050, 1055-56 (9th Cir. 2006).

8 **B. Remand is appropriate.**

9 The decision whether to remand for further proceedings is within this
10 Court’s discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000)
11 (as amended). Where no useful purpose would be served by further
12 administrative proceedings, or where the record has been fully developed, it is
13 appropriate to exercise this discretion to direct an immediate award of benefits.
14 See Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004); Harman, 211 F.3d
15 at 1179 (noting that “the decision of whether to remand for further proceedings
16 turns upon the likely utility of such proceedings”). A remand for further
17 proceedings is appropriate where outstanding issues must be resolved before a
18 determination of disability can be made and it is not clear from the record that
19 the ALJ would be required to find the claimant disabled and award disability
20 benefits. See Bunnell v. Barnhart, 336 F.3d 1112, 1115-16 (9th Cir. 2003).

21 Here, the Court concludes that remand to the Commissioner for further
22 administrative proceedings is warranted. The resolution of Plaintiff’s
23 credibility affects the other outstanding issues raised in the Joint Stipulation.
24 Plaintiff contends in Issue No. 2 that the ALJ erred by finding her depression
25 not severe at step two of the disability analysis. (Jt. Stip. at 2-4.) The ALJ
26 relied in part on Plaintiff’s subjective reports to doctors, as well as the daily
27 activities discussed above and found insufficient to discredit Plaintiff. (AR 30.)
28 Thus, a remand will allow the ALJ to reconsider the step two finding in light

1 of the reassessment of Plaintiff's subjective complaints. Moreover, Plaintiff's
2 credibility necessarily affects her RFC (Issue No. 3), and remand will allow the
3 ME to assess the records he was not able to review (Issue No. 4.). (Jt. Stip. at
4 8-9, 11-15.) See Vaughn v. Berryhill, 242 F. Supp. 3d 998, 1010 (E.D. Cal.
5 2017) (dispensing of exhaustive analysis of plaintiff's remaining issues because
6 "[t]he ALJ's findings at step two [and] his evaluations of [p]laintiff's credibility
7 . . . are inescapably linked to conclusions regarding the medical evidence");
8 Alderman v. Colvin, 2015 WL 12661933, at *8 (E.D. Wash. Jan. 14, 2015)
9 (remanding in light of interrelated nature of ALJ's decision to discount
10 claimant's credibility, make a proper step two analysis, and give appropriate
11 consideration to physician's opinions).

12 Because it is unclear, in light of these outstanding issues, whether
13 Plaintiff is in fact disabled, remand here is on an "open record." See Brown-
14 Hunter, 806 F.3d at 495; Burrell, 775 F.3d at 1141-42; Bunnell, 336 F.3d at
15 1115-16. The parties may freely take up all issues raised in the Joint
16 Stipulation, and any other issues relevant to resolving Plaintiff's claim of
17 disability, before the ALJ.

18 Accordingly, on remand, the ALJ shall reassess Plaintiff's subjective
19 complaints, and then reassess her severe impairments and Plaintiff's RFC in
20 light of the subjective symptom testimony and proceed through step four and
21 step five, if necessary, to determine what work, if any, Plaintiff is capable of
22 performing that exists in significant numbers.

23 IV.

24 ORDER

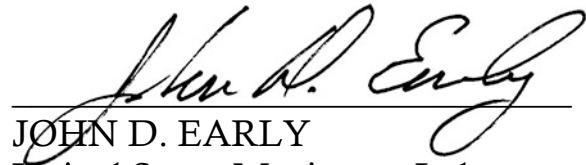
25 Pursuant to sentence four of 42 U.S.C. § 405(g), IT THEREFORE IS
26 ORDERED that Judgment be entered reversing the decision of the

27 //

28 //

1 Commissioner of Social Security and remanding this matter for further
2 administrative proceedings consistent with this Order.

3
4 Dated: June 13, 2018

5
6 
7 JOHN D. EARLY
8 United States Magistrate Judge
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28